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No. 91-1188

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

JAMES ROWLAND, et al., Petitioners,

v.

CALIFORNIA MEN'S COLONY, UNIT II
MEN'S ADV. COUNCIL, Respondent.

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether an organization, association, or corporation, and in particular an inmate association, may proceed in forma pauperis as a "person" within the meaning of 28 U.S.C. section 1915(a).[1/]

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1. This question was not expressly considered by the district court but was the sole issue addressed by the Ninth Circuit in its opinion. CMC Unit II Men's Adv. Council v. Rowland, 939 F.2d 854, 856, n.1 (9th Cir. 1991), hereinafter "CMC".

LIST OF PARTIES

When respondent filed its action, petitioner James Rowland was the director of the California Department of Corrections; petitioner James H. Gomez was the Chief Deputy Director of the Department of Corrections; petitioner Sara Bruce was the Chief of the Regulation and Policy Management Unit, Department of Corrections; and petitioner Leslie Bandaccari worked in the Institutions Services Unit, Department of Corrections.

Respondent Men's Advisory Council, California Men's Colony-West, is a voluntary association of inmates incarcerated in the California Men's Colony-West.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 4

SUMMARY OF THE ARGUMENT 7

ARGUMENT 9

ASSOCIATIONS ARE NOT ENTITLED TO IN FORMA PAUPERIS STATUS UNDER 28 U.S.C. SECTION 1915 9

A. The legislative history of section 1915(a) provides no basis for permitting associations to proceed in forma pauperis 11

B. The instant decision creates immense practical problems of administration which remain unanswered 17

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

Atlantic S.S. Corp. v. Kelley
79 F.2d 339, 340 (5th Cir. 1935) 12

Brown v. Johnston
99 F.2d 760 (9th Cir. 1938) 10

Cass v. U.S.
417 U.S. 72, 83 (1974) 16

CMC Unit II Men's Adv. Council v. Rowland
939 F.2d 854 (9th Cir. 1991) ..... i, 1, 10, 17, 19, 23

Community for Creative Non-Violence v. Reid
490 U.S. 730, 749 (1989) 15

Crumpton v. Gates
947 F.2d 1418 (9th Cir. 1991) 11

FDM Mfg. Co. v. Scottsdale
Insurance Company
855 F.2d 213 (5th Cir. 1988) 13, 15, 18, 22

Ford Motor Credit Co. v. Milhollin,
444 U.S. 555, 565 (1980) ..... .15

Harlem River Consumers Coop. v. Associated Grocers,
71 F.R.D. 93 (S.D. N.Y. 1976) 13, 23

Hawkeye Bank and Trust v. Baugh
463 N.W.2d 22 (Iowa 1990) 20

Hernandez v. Denton
861 F.2d 1421 (9th Cir. 1988) 24

Hernandez v. Denton
No. 90-1846 10

Honolulu Lumber Co. v.
American Factors Ltd.
265 F.Supp. 578 (D. Hawaii 1966)
aff'd. on other grounds, 403 F.2d 49
(9th Cir. 1968) 13, 18

Hunt v. Washington State Apple Adv. Comm.
432 U.S. 333, 343 (1977) 21

Jones v. Niagra Frontier Trans. Auth.
722 F.2d 20 (2d Cir. 1983) 20, 21

MOVE Organization v.
U.S. Dept. of Justice
555 F.Supp. 684 (E.D. Penn. 1983) 13, 14, 18

Neitzke v. Williams
490 U.S. 319 (1989) 5, 22

Oahu Plumbing v. Kona Construction
590 P.2d 570 (Haw. 1979) 21

Quittner v. Motion Picture
Producers & Distributors of America, Inc.
70 F.2d 331 (2nd Cir. 1934) 12

River Valley, Inc. v. Dubuque County,
63 F.R.D. 123 (N.D. Iowa, 1974) 13

Rogers v. Municipal Court
197 Cal.App.3d 1314
243 Cal.Rptr. 530 (1988) 20

Schmid v. U.S.
436 F.2d 987, 992 (Ct.Cl. 1971) 15

Sears Roebuck & Co. v.
C.W. Sears Real Estate
686 F.Supp. 385 (N.D. N.Y. 1988)
aff'd. 865 F.2d 22
(2d Cir. 1988) 13, 15, 18, 20

SOUP Inc. v. FTC
449 F.2d 1142 (D.C. Cir. 1971) 12, 13

Southwest Express Co. v. ICC
670 F.2d 53 (5th Cir. 1982) 20

Strong Delivery Ministry Assn. v.
Bd. of Appeals
543 F.2d 32 (7th Cir. 1976) 20

Taylor v. Knapp
871 F.2d 803 (9th Cir. 1989)
cert. den. 493 U.S. 868 (1989) 20

U.S. v. Martin
866 F.2d 972 (8th Cir. 1989) 11

Walacavage v. Excell 2000
480 A.2d 281 (Pa. 1984) 20

Warth v. Seldin
422 U.S. 490 (1975) 5

Weller v. Dickson
314 F.2d 598 (9th Cir. 1963)
cert. den. 375 U.S. 845 (1963) 10

Statutes and Codes

1 United States Code
section 1 ..... 2, 8, 11, 12

18 United States Code
section 2118(b) 11

28 United States Code
section 1254(1) 2

28 United States Code
section 1915(a) 2, 8, 9, 11, 12, 13, 14, 23

28 United States Code
section 1915(d) 5, 7, 22

California Government Code
section 11349 6

Code of Calif. Reg., Title 15
section 3180 5

Federal Rules of Civil Procedure,
Rules 23, 23.2 19

United States Constitution
Eighth Amendment 6

Other Authorities

Black's Law Dictionary
(4th ed. 1951) 9

Feldman, Indigents in the Federal
Courts
54 Fordham L.R. 413 (1985) 24

Note: Controlling and Detering Frivolous
In Forma Pauperis Complaints
55 Fordham L.R. 1165 (1987) 24

Note: Proceeding In Forma Pauperis
in Federal Court: Can Corporations Be Poor "Persons"?
62 Cal.L.Rev. 219 (1974) 11

Turner, When Prisoners Sue
92 Harvard L.Rev. 610 (1979) 24

1959 U.S. Code Cong. &
Admin. News 2663-2666 . . . . . 13, 14

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PETITIONERS' BRIEF ON THE MERITS

OPINIONS BELOW

The opinion for the Court of Appeals for the Ninth Circuit is reported at 939 F.2d 854 (9th Cir. 1991) and is reprinted in the appendix attached to the Petition for Certiorari.

JURISDICTION

The Ninth Circuit rendered its opinion and entered judgment on July 29, 1991. The Ninth Circuit, after consideration of petitioners' request for rehearing en banc, denied the request on December 5, 1991. The petition for certiorari was granted on March 2, 1992.

The jurisdiction of this court to review the judgment of the Ninth Circuit by means of certiorari arises under 28 U.S.C. section 1254(1).

STATUTE INVOLVED

The statute involved is subdivision (a) of 28 U.S.C. 1915, relating to proceedings in forma pauperis, which reads as follows:

> Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

With regard to the term "person" in section 1915(a), the Ninth Circuit referred to the following portions of 1 U.S.C. section 1:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise-- . . . the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

STATEMENT OF THE CASE

This case involves an inmate association which was denied leave to proceed in forma pauperis by the district court. In December 1989, the Men's Advisory Council lodged its complaint with the district court. In addition to the complaint, the Men's Advisory Council filed a motion for leave to proceed in forma pauperis and a declaration supporting that application. The declaration, signed by an association officer, alleged personal poverty on the part of the declarant.

On December 22, 1989, an order was filed by the district court denying this motion. The Men's Advisory Council requested that the court reconsider its motion, but that request was denied on March 27, 1990. The Men's Advisory Council filed a timely notice of appeal on April 18, 1990.

The Attorney General of the State of California represents petitioners by reason of a July 20, 1990 order of the Ninth Circuit requiring "the Attorney General of the State of California to enter an appearance on behalf of appellees, to file a brief on their behalf, and to appear at any oral argument." The Attorney General complied with that order and has been regarded as counsel of record since the issuance of the order. However, petitioners, the named defendants in this case, have not been served and therefore they have not yet requested the Attorney General to represent them. The only facts which are in the record are those alleged by respondent in the complaint.

STATEMENT OF FACTS

The Men's Advisory Council of California Men's Colony, West Facility (CMC), Unit II was created by Warden's General Order Number 38. As described in the complaint, the association has the following purpose and objectives:

(A) To promote the welfare of the inmates through their duly elected representatives, to analyze and properly present to the Program Administrator ("P.A.") and the Warden/Chief Deputy Warden, recommendations which may, upon approval, lead to the common and mutual benefit of all inmates of CMC.

(B) To provide inmates of CMC with representation and a voice in administrative deliberations and decisions affecting the welfare and best interest of all inmates.

(C) To provide the Warden/Chief Deputy Warden and institution administrative staff with a means whereby administrative actions, and the reasons for these actions, may be communicated and understood by the general inmate population.

The members of the Men's Advisory Council are elected from the general prison population. Under Warden's Order No. 38, the Men's Advisory Council is not authorized to create an account or to collect funds.

Since 1949, the Department of Corrections of the State of California had maintained a program, reflected in

Director's Rules Section 3180, of providing free tobacco to inmates who are without funds to purchase it. On June 16, 1989 the Department issued a memorandum which discontinued this program.

Because there are incarcerated persons with an addiction to nicotine, discontinuing the distribution of free tobacco to these inmates forces them to support their addiction in other ways. Some inmates in California Men's Colony, West Facility, Unit II have been observed scavenging cigarette butts off sidewalks, ditches, gutters, and underneath dormitory steps. These practices, as well as the practice of lighting one cigarette and allowing many inmates to take turns smoking it, create a dangerous health risk by increasing the possibility of transmitting AIDS[2/] and other infectious diseases. In addition, indigent inmates may become indebted to other inmates in exchange for cigarettes, thereby risking the health and safety of those individuals. The Men's Advisory Council submitted an administrative appeal to the Warden of

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2. This and other factual assertions are presently uncontested in the record, but it must be remembered that this matter went to the lower appellate court before any discovery was undertaken or any dispositive motions were made. Moreover, there has been no opportunity to challenge the constitutional standing of the association to assert its members' rights. See Warth v. Seldin, 422 U.S. 490, 510 (1975). Finally, the issue of whether the discontinuance of free tobacco constitutes a violation of the Eighth and Fourteenth Amendments or is a frivolous legal claim under section 1915(d) is not discussed infra. Neitzke v. Williams, 490 U.S. 319, 325 (1989).

California Men's Colony, West Facility, requesting that distribution of free tobacco to indigent inmates be resumed. The appeal was denied on August 25, 1989.

The Men's Advisory Council attempted to file a complaint for violation of civil rights with the United States District Court for the Central District of California, through the Council's chief officer, William Cochran. The complaint named as defendants: James Rowland, Director of the California Department of Corrections; James H. Gomez, Chief Deputy Director of the California Department of Corrections, Sara Bruce, Chief of the Regulations and Policy Management Unit of the California Department of Corrections; and Leslie Bandaccari, an employee of the California Department of Corrections. The Men's Advisory Council claims that its members' federal rights were violated when the defendants repealed section 3180 prior to submission and action by the Office of Administrative Law, as required by California Government Code Section 11349. Further, the Men's Advisory Council claims that the defendants violated the Council's members' Eighth Amendment rights by creating conditions which cause mental, physical, and emotional deterioration. The Men's Advisory Council sought only declaratory and injunctive relief.

With its complaint, the Men's Advisory Council filed a motion for leave to proceed in forma pauperis, together with an affidavit executed by the Council's Chairman, William Cochran. The declaration was a statement of Cochran's poverty. On December 15, 1989, a United States Magistrate recommended that the in forma

pauperis application be denied due to an inadequate showing of poverty. On December 22, 1989, the district court followed that recommendation and ordered that the application be denied. William Cochran, Chairman of the Men's Advisory Council, then requested reconsideration of the court's denial of leave to proceed in forma pauperis. Judge Takasugi denied the request for reconsideration, but indicated that the court would consider an amended application which included details of each individual's indigency.

On April 18, 1990, the Men's Advisory Council, through Cochran, filed a notice of appeal with the United States District Court for the Central District of California. The Men's Advisory Council also submitted a motion and affidavit to appeal in forma pauperis, which was denied by the district court on April 19, 1990. On July 20, 1990, the court of appeals, on its own motion and under 28 U.S.C. section 1915(d), appointed present counsel to represent the Men's Advisory Council. The court also granted the motion for leave to appeal in forma pauperis.

SUMMARY OF THE ARGUMENT

The Ninth Circuit, having accepted the logic of two district court opinions and rejected the opinions of two circuit courts and three district courts, created a split between the circuits as to the issue of whether organizations, be they associations or corporations, may be granted in forma pauperis status under section 1915(a). The sole circuit court minority opinion, CMC, states that because Congress did not explicitly consider the issue of

whether organizations may have such status when it amended section 1915(a) to refer to "persons" instead of "citizens", and because section 1 includes such organizations as part of its omnibus definition of "persons", Congress must have intended that such organizations be "persons" within the meaning of section 1915(a). The majority position holds that the legislative history shows that Congress meant only one thing when it amended the statute. That intent was to extend the benefits of section 1915(a) to resident aliens. The Ninth Circuit's extension of section 1915(a) on the basis of this single-minded legislative history is simply building policy upon a fiction or pretext. At the very least, Congress has not spoken on the issue and our courts should not improvise on the basis of such silence.

Aside from the legislative history, substantial procedural questions flow from the decision, including vexing problems of indigency tests and standing. None of these questions is answered in the opinion, and the complexity of these issues suggests that no court could reasonably implement a scheme for permitting organizations to apply for in forma pauperis status without Congress' involvement. The ramifications of such a major procedural change such as that announced in CMC cannot be decided on a case by case basis.

ARGUMENT

ASSOCIATIONS ARE NOT ENTITLED TO IN FORMA PAUPERIS STATUS UNDER 28 U.S.C. SECTION 1915

The underlying circumstances of this case are undisputed in the record, as the sole pleading in the record is the complaint. Further, there is a small and discrete body of law and legislative history which all the parties, the circuit court, and other circuit courts which have considered the subject agree is relevant.

Nevertheless, there is no unanimity as to whether section 1915(a) permits associations[3/] to proceed in forma

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3. There may be some confusion as to terminology without a further definition of terms. The following definition of "association" is derived from Black's Law Dictionary (4th ed. 1951):

> The act of a number of persons in uniting together for some special purpose or business. The persons so joining. It is a word of vague meaning used to indicate a collection of persons who have joined together for a certain object . . . An unincorporated society; a body of persons united and acting together without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise . . . . It is not a

pauperis.[5/] The Ninth Circuit, having determined that there is a split among the circuits, has in candid fashion considered both sides and chosen the minority view, i.e. that associations may proceed in forma pauperis. CMC at 858. This Court must resolve the manifest conflict among the circuits in the interpretation of the in forma pauperis statute and declare a uniform rule for the guidance of the district courts in light of the legislative history and this Court's own independent power to prescribe procedures for the efficient administration of the federal courts.[2/]

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legal entity separate from the persons who compose it . . . .

4. Section 1915 appears to be a breeding ground for these peculiar and seemingly unavoidable procedural disputes. *See* Hernandez v. Denton, No. 90-1846 [section 1915(d)].

5. No constitutional issue is implicated here. The benefits of in forma pauperis are "entirely statutory." Weller v. Dickson, 314 F.2d 598 (9th Cir. 1963), cert. den. 375 U.S. 845 (1963); Brown v. Johnston, 99 F.2d 760 (9th Cir. 1938).

A. The legislative history of section 1915(a) provides no basis for permitting associations to proceed in forma pauperis.

As outlined in CMC, the crucial issue is whether the word "person" in 28 U.S.C. section 1915(a) is interpreted to include "corporations, companies [and] associations" as defined in 1 U.S.C. section 1.[6/] To decide that, it is necessary to establish the intent of Congress when it enacted that language. Few courts have addressed this question, and those few have disagreed, but the legislative history is not in dispute. See Note: Proceeding In Forma Pauperis in Federal Court: Can Corporations Be Poor "Persons"?, 62 Cal.L.Rev. 219 (1974).

Before 1959 only a "citizen" could benefit from section 1915 and it was settled law that a corporation was not a citizen for purposes of obtaining in forma pauperis

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6. CMC assumes that section 1 is the only possible source for definition of "person". By its own terms, section 1 has no universal pretentions. The section 1 definition is assumed to apply "unless the [statutory] context indicates otherwise". 1 U.S.C. section 1. If the context of the statute in question indicates a different meaning for "person", the statute-specific interpretation should be used. Cf. Crumpton v. Gates, 947 F.2d 1418 (9th Cir. 1991) [fetus, upon birth, is a "person" within the meaning of section 1983]; U.S. v. Martin, 866 F.2d 972 (8th Cir. 1989) [drug store is "person" within meaning of 18 U.S.C. section 2118(b)].

status. Atlantic S.S. Corp. v. Kelley, 79 F.2d 339, 340 (5th Cir. 1935); Quittner v. Motion Picture Producers & Distributors of America, Inc., 70 F.2d 331, 332 (2d Cir. 1934). In 1959, section 1915 was amended by substituting the word "person" for "citizen," and the legislative history is clear that the purpose of this change was only to permit resident aliens to sue in forma pauperis. However, section 1 provides that in "determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the word 'person' . . . include[s] corporations, companies, associations . . . ." The question, then, is whether Congress, when it adopted the word "person," intended that word to extend the coverage of section 1915 to all entities listed in section 1 or merely to resident aliens.

The primary argument for the inclusion of associations, companies or corporations within section 1915(a) was made by Chief Judge Bazelon in his dissenting opinion in SOUP Inc. v. FTC, 449 F.2d 1142, 1143 (D.C. Cir. 1971). The Chief Judge argued that Congress should be deemed to have been aware of section 1 when it amended section 1915(a), and that there was no indication in the legislative history of the 1959 amendment to indicate otherwise.

Two district courts have followed Judge Bazelon's lead, both phrasing their arguments in double negatives. "Neither the language nor the legislative history of § 1915(a) indicates that a corporation composed of and serving primarily poor persons should not be allowed to proceed in forma pauperis the same as an indigent

individual." River Valley, Inc. v. Dubuque County, 63 F.R.D. 123, 124 (N.D. Iowa 1974). "In this Court's view, neither the words of the statute nor its legislative history can be read to attribute to Congress an intent not to include corporations of whatever nature within the meaning of the word 'person' in this statute. [Emphasis in original.]" Harlem River Consumers Coop. v. Associated Grocers, 71 F.R.D. 93, 95 (S.D. N.Y. 1976).

The courts of appeals of two circuits and three district courts, including Judge Bazelon's own court, have rejected this reasoning. FDM Mfg. Co. v. Scottsdale Insurance Company, 855 F.2d 213, 214-215 (5th Cir. 1988); SOUP Inc. v. FTC, 449 F.2d at 1142-1143; Sears Roebuck & Co. v. C.W. Sears Real Estate, 686 F.Supp. 385, 386-388 (N.D. N.Y. 1988), aff'd. 865 F.2d 22, 23 (2d Cir. 1988); MOVE Organization v. U.S. Dept. of Justice, 555 F.Supp. 684, 690-692 (E.D. Penn. 1983); Honolulu Lumber Co. v. American Factors Ltd., 265 F.Supp. 578, 580-581 (D. Hawaii 1966), aff'd. on other grounds, 403 F.2d 49 (9th Cir. 1968). Aside from Honolulu Lumber, which predated SOUP, all of these cases considered and specifically rejected the Bazelon argument.

Petitioners rely on the majority rule. The legislative history detailed in the majority cases provided "compelling evidence" of Congressional intent. See generally 1959 U.S. Code Cong. & Admin. News 2663-2666. These courts found that the sole reason for the 1959 amendment was to allow resident aliens to proceed in forma pauperis and that there was no indication whatsoever that Congress intended to extend section 1915 to associations and

corporations.

> [T]he [in forma pauperis] statute, until its amendment in 1959, used the word "citizen" rather than "person." Hence, it was clear, before 1959, that a corporation would not be deemed a citizen for purposes of [in forma pauperis] status. . .
>
> The 1959 amendment to section 1915(a) changed only one word-from "citizen" to "person". The only reason given, in the legislative history, for the change was to grant [in forma pauperis] status to aliens. See S.Rep. No. 947, 86th Cong., 1st Sess. 2-4 (quoting H.R. Rep. No. 650, 86th Cong., 1st Sess. 2-3 (1959)), reprinted in 1959 U.S. Code Cong. & Ad. News 2663, 2664-65 (cited in MOVE Org., 555 F.Supp. at 691 n. 22).
>
> This legislative history is convincing. We would be impermissibly reading more into the statute than Congress intended if we were to hold that the 1959 amendment added corporations as well as aliens to the list of those entitled to seek [in forma pauperis] status. While there may be perfectly sensible policy grounds for allowing financially strapped corporations to proceed [in forma pauperis], we must leave it to the legislative branch to make that determination. As Judge Giles states in MOVE Org., "although the policy analysis . . . may be a valid method of common-law rulemaking, it is inappropriate as a method of construing this statute. . . . It gives the word 'person' a meaning which cannot reasonably found in the intent of Congress" 555 F.Supp. at 692.

FDM Mfg. Company v. Scottsdale Ins. Co., 855 F.2d at 214; see Sears Roebuck & Company v. C.W. Sears Real Estate, 686 F.Supp. at 388.

Congress has not spoken on this issue and courts are not free to fashion policy in Congress' name when Congress has been silent. "Ordinarily, 'Congress' silence is just that -- silence.'" Community for Creative Non-Violence v. Reid, 490 U.S. 730, 749 (1989). "[C]aution must temper judicial creativity in the face of legislative . . . silence." Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980). In the instant case, silence is an insufficient basis for concluding that Congress intended to reverse the pre-1959 interpretation of section 1915(a). Surely such a dramatic reversal in policy requires an explicit disowning. The legislative history shows Congress' attention was directed to an entirely separate problem, resident aliens, and the issue of organization in forma pauperis standing never was, even in the most indirect way, considered by Congress.

Moreover, "[i]n resolving ambiguity, we must allow ourselves some recognition of the existence of sheer inadvertence in the legislative process." Schmid v. U.S., 436 F.2d 987, 992 (Ct. Cl. 1971) (Nichols, J., dissenting),

cited with approval in Cass v. U.S., 417 U.S. 72, 83 (1974). Even if respondent's theory is that Congress did not address the issue through inadvertence, this is no basis for a court's declaration of what that intent would have been had Congress actually considered the matter. Such a court interpretation would simply be legislation upon a pretext. Congress should not be deemed to have made a policy reversal on a matter of which it was totally ignorant.

Neither silence nor inadvertence can be interpreted as Congressional intent, given the 1959 legislative history. Under these circumstances, to permit associations to litigate in forma pauperis is to create policy without benefit of Congressional authorization.

B. The instant decision creates immense practical problems of administration which remain unanswered.

The legal authority contrary to the Ninth Circuit's holding is significant. But there are practical effects of the opinion on the administration of justice in the district courts which should also be considered. CMC's failure to address numerous ancillary procedural issues is less an indication of the diligence of the court below than a sign that courts are not equipped to legislate. CMC postpones these procedural problems to another day and leaves the district courts to deal with a caseload which is sure to rise and for which there is no systematic guidance.

The primary problem is the test for indigency. The Ninth Circuit chose to defer the issue because the Men's Advisory Council could not have assets by the terms of its organizational grant. This is a singular condition which has no bearing on the majority of the potential organization plaintiffs. Yet the court did not "delineate the procedure by which . . . courts are to make that indigency determination". Indeed, the court eschewed "a comprehensive test for determining indigency" and did not decide "the relevance of members' individual finances in determining an association's indigency." CMC at 859, n.5. In short, the court admitted that an entirely new test of indigency must be developed for the associations it freed to pursue litigation in their own names and then it declined to state the terms of the new test or whether one test would resolve the matter.

For the courts denying section 1915 to organizations, determination of poverty was a major concern. The court in each case, except FDM Mfg. Company, either pierced the corporate veil or said it would have to do so if organizations were covered by section 1915. The problem is most clearly stated in Sears Roebuck & Company v. C.W. Sears Real Estate, 686 F.Supp. at 388:

> In addition to this legislative history, another consideration weighs against permitting corporations to reap the benefits of section 1915. If corporations were allowed to proceed in forma pauperis, there would exist the prospect that stockholders of a closely-held corporation might try to hide behind a corporate veil in order to avoid the costs of litigation. This danger was touched upon in MOVE Organization, 555 F.Supp. at 691, and Honolulu Lumber, 265 F.Supp. at 581. That such a scenario would arise is so obvious that it is doubtful that Congress would not have provided some guidance to the courts concerning how deeply they should look behind the corporate structure to determine indigency if it truly intended corporations to reap the benefits of the statute.

Clearly the lack of any specified test for indigency of a corporation, let alone an unincorporated association, presents immense practical problems for which CMC provides no remedy.

The possibilities for collusive evasion of standing, indigency and other requirements are evident. An "indigent" association, one which was forbidden to have assets, could be created solely for the purpose of acting as a litigant for non-indigent parties. Those declared vexatious litigants may proceed to litigate their meritless causes through an organization. Potential litigants may evade the carefully constructed procedure for certifying class actions. F.R.C.P. Rules 23, 23.2. Rather than proceeding as a class, individual related plaintiffs will proceed as ad hoc organizations. Discovery will be needlessly encumbered by the necessity to search for individuals with standing and with true cases and controversies. Our district courts should not be confronted with a myriad of loose confederations which are in forma pauperis litigation agencies in perpetuity for whatever individual grievances some number of its members might have.

If the corporation presents a substantial problem as an in forma pauperis plaintiff, a less formal organizational structure such as a voluntary unincorporated association presents a greater danger. Such an association does not necessarily meet the formal state standards for incorporation and the absence of compliance with such standards amplifies the danger pointed out in the Sears Roebuck case. The absence of such formalities implies an amorphousness inconsistent with efficient judicial administration. Yet CMC assumes the distinction is of no importance. CMC at 857, n. 3.

Needless to say, no further discussion of the possible

distinctions between corporations and associations is made in CMC. But, for example, a corporation board may vote to proceed with litigation and if this is done, there is no dispute that the vote represents the shareholders. Moreover, it may be determined that the board vote is the appropriate mode for authorization of the action by reference to the corporation charter. The formal corporate structure embodied in the corporation charter, read within the context of the state corporation laws, leaves no doubt as to the legitimacy of the corporation's initiation of the legal action. However, if the non-natural plaintiff is not incorporated, there are no ready means to determine whether the litigation is authorized and whether members of the group may be assessed individual shares of sanctions or receive pro rata shares of any judgment or settlement.

Other unanswered questions abound. For example, a corporation cannot appear pro se and must litigate through an attorney, and this rule is "venerable and widespread". Jones v. Niagra Frontier Trans. Auth., 722 F.2d 20, 22 (2d Cir. 1983); Sears Roebuck & Company v. C.W. Sears Real Estate, 686 F.Supp. at 386, n. 1. Both the Ninth Circuit and the California state courts honor this rule (Taylor v. Knapp, 871 F.2d 803, 806 (9th Cir. 1989), cert. den. 493 U.S. 868 (1989); Rogers v. Municipal Court, 197 Cal.App.3d 1314, 1318, 243 Cal.Rptr. 530 (1988)), and there is no case contrary to the rule. See Southwest Express Co. v. ICC, 670 F.2d 53, 55 (5th Cir. 1982); Strong Delivery Ministry Assn. v. Bd. of Appeals, 543 F.2d 32, 34 (7th Cir. 1976); Hawkeye Bank and Trust v. Baugh, 463 N.W.2d 22, 25-26 (Iowa 1990); Walacavage

v. Excell 2000, 480 A.2d 281, 284 (Pa. 1984); Oahu Plumbing v. Kona Construction, 590 P.2d 570, 572-573 (Haw. 1979).

The rationale for the rule is simple. As stated in Jones at 22, a corporation appearing pro se without attorney representation may lack the necessary professional skills and ethics. The conduct of litigation by a non-lawyer "creates unusual burdens not only for the party he represents but as well for his adversaries and the court." It does not appear that associations are better equipped to appear in propria persona than corporations, and therefore no association should appear without a lawyer representing it. This is not an insignificant issue, but no mention of this problem is made in CMC.

An association, unlike a corporation, is not a legal entity unto itself. Therefore, this Court has devised standing rules which govern the right of associations to sue in a representative capacity, as opposed to the ability to sue where the organization itself is the entity whose rights are in question. Hunt v. Washington State Apple Advertising Comm., 432 U.S. 333, 343 (1977) permits non-natural persons to file section 1983 actions on behalf of their members if three conditions are met:

> [An] association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief

request requires the participation of individual members in the lawsuit.

These standing rules qualify and restrict the "representative" actions which may be prosecuted by an association or corporation. Thus, in the instant case, the Men's Advisory Council could not bring the action because participation of the individual users of tobacco would be necessary, assuming, as is logical, not all Men's Advisory Council members used tobacco. The third Hunt condition is violated. Moreover, the organization itself and a portion of its members do not consume tobacco and would not have standing to sue in their own right. To put it another way, not all Men's Advisory Council members could sue in their own right, and therefore the organization cannot sue for them under the first Hunt condition. The same would be true if the Men's Advisory Council were complaining of lack of weight training equipment, kosher food, or any of the many features of prison life which do not necessarily relate to the confinement of every prisoner.

These very stringent standing requirements limit association in forma pauperis status to those cases where the entire membership, and hence the organization itself, is directly affected, assuming the second Hunt condition is fulfilled. CMC contains no discussion of standing and it may be that the Ninth Circuit assumed that any complaint which did not meet the Hunt standards would be deemed frivolous under section 1915(d), i.e. containing no arguable legal cause, and dismissed. Neitzke v. Williams, 490 U.S. at 325; see FDM Mfg. Company v. Scottsdate Ins. Co.,

855 F.2d at 215; Harlem River Consumers Coop. v. Associated Grocers, 71 F.R.D. at 97-98. However, the Hunt requirements are such an integral part of determining in forma pauperis status that the failure to discuss this issue is a significant omission which can and will lead to substantial future litigation.

The minority rule announced in CMC is not one which will afford the district courts much leisure, and if the Ninth Circuit is "loath to fetter the discretion of future courts" (CMC at 859), at least it may be said that that future is not far off. The Ninth Circuit has expanded the scope of section 1915(a) in a manner which will inevitably increase the number of in propria persona section 1983 cases. We need not rely on empirical verification of the proposition that if a decision increases the number of possible plaintiffs who may proceed in forma pauperis, those plaintiffs will file their cases because there is no economic incentive not to file. Moreover, the obvious advantages given to association plaintiffs by the Ninth Circuit in evading the requirements of class certification, avoiding vexatious litigant determinations, and complicating discovery insure that there will be no reticence on their part to proceed.

Any expansion of the number of possible defendants will exert a hydraulic pressure on our overburdened trial courts, at least in the single circuit which permits association suits in forma pauperis. The total number of prisoner civil rights cases increased 1600 percent during the 20-year period ending in 1987, and the number of these cases which were meritorious was very small, both

proportionately and absolutely. Hernandez v. Denton, 861 F.2d 1421, 1431 (9th Cir. 1988) (Aldisert, J., dissenting); Note: Controlling and Deterring Frivolous In Forma Pauperis Complaints, 55 Fordham L. Rev. 1165 (1987); Feldman, Indigents in the Federal Courts, 54 Fordham L. Rev. 413 (1985); Turner, When Prisoners Sue, 92 Harvard L. Rev. 610 (1979). Under these extreme caseloads, any delay in reversing CMC will result in a radical increase in the number of in forma pauperis cases in the Ninth Circuit and any other circuits which choose to adopt CMC.

CONCLUSION

The legislative history of section 1915 offers no support to the inclusion of organizations within its coverage, and such an inclusion would create serious and unresolved problems of verification of poverty, standing and case and controversy. Therefore, this Court should reverse the holding of the Ninth Circuit.

DATED: April 10, 1992

Respectfully submitted,

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) ss.
CITY AND COUNTY)
OF SACRAMENTO)

CYNTHIA BAIN, being first duly sworn on oath deposes and states:

I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K Street, Suite 511, Sacramento, California 95814.

On April 10, 1992, I served the attached **PETITIONER'S BRIEF ON THE MERITS** in Rowland, et al. v. California Men's Colony, Unit II Men's Advisory Counsel, No. 91-1188, by placing a true copy thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

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Cynthia Bain
AFFIANT

Subscribed and sworn to before me this 10th day of April, 1992.

Notary Public in and for said County and State

LUCINDA SEATON
NOTARY PUBLIC - CALIFORNIA
County of Sacramento
My Commission Expires 3/3/93